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No. 08-1010

IN THE
Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,
Petitioner,

v.

JEREMY FLAX, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNSEL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 108 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in every major facet of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 850 briefs as amicus curiae, in this Court and the state and federal courts, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as an Appendix. [1]

As part of the regular product-design process, PLAC's corporate members must routinely analyze

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[1] Pursuant to S. Ct. R. 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's Office.

and resolve questions about safety. PLAC members who manufacture products with potential risks of significant physical injury — including pharmaceuticals, medical devices, pesticides, foodstuffs, chemicals, appliances, power tools, and automobiles — have a particular interest in the legal ramifications of product design decisions.

It is therefore particularly important to PLAC's members that the law provide clear guidance on how manufacturers can avoid the imposition of punitive liability.

INTRODUCTION AND SUMMARY OF ARGUMENT

When designing a product, manufacturers are expected to weigh the utility of a product's design features against the risk,[2] but a manufacturer whose design process includes such a calculus can later be charged with punitive damages for "knowingly" designing a product that poses grave risks to consumers. The more transparent and comprehensive that manufacturer's design analysis is, the more the manufacturer opens itself up to such a charge. When the product being manufactured carries inherent risks, such as the automobile at issue in this case, experts will invariably debate the relative benefits and risks of the proposed features. Manufacturers are routinely forced to make decisions in the face of imperfect information and conflicting predictions. When a manufacturer's "knowledge" that its product poses known risks to consumers is deemed sufficient to sustain a punitive award, the

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[2] Restatement (Third) of Torts, Product Liability § 2(b) (1998).

common law gives no guidance as to how a manufacturer can avoid the risk of punitive liability.

Absent objective indicators of reasonableness, responsible manufacturers can never know in advance whether their design decisions will subject them to punishment and post hoc second guessing. Under state law, as applied in this case, the manufacturer was subjected to punishment despite the fact that its conduct conformed with all objective benchmarks of proper and lawful design. Its design exceeded the specific and detailed regulatory requirements governing seat strength (49 C.F.R. § 571.207) and conformed with all industry standards. App. 18a. Even further, the manufacturer presented evidence at trial that the alternative design proposed by the Plaintiffs would provide less protection to occupants in other types of accidents. App. 26a. Thus, if the manufacturer had used that alternative design, it would have "knowingly" caused injuries in other types of accidents and — under the theory advanced by the Plaintiffs here — would have been subject to punitive damages in cases arising from other accidents.

At most, Petitioner's design was subject to reasonable debate or disagreement. That a plaintiff can find an expert to attack the design long after the fact does not give the manufacturer "fair notice * * * of the conduct that will subject [it] to punishment." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996). Rather, the imposition of punitive damages in such a case "mak[es] the law so arbitrary that [manufacturers] will be unable to avoid punishment based solely upon bias or whim." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (quoting *Pacific Mut. Life Ins. Co. v.*

Haslip, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting)).

In recent years, this Court has placed much-needed constraints on excessive common-law punitive damages awards. However, it has not articulated the precise constraints that due process imposes on punitive liability.

The arbitrary and standardless imposition of punitive damages is far too common in product liability cases. By their very nature, such cases pose a great risk of hindsight bias, jury sympathy for seriously injured plaintiffs, and of juror bias against large corporations. A manufacturer's intention to design a product that has inherent risks can easily be confused with intent to cause harm. Manufacturers who make good faith design decisions that balance the risks of injury inherent in myriad circumstances, and whose products comply with detailed regulatory standards and meet and even exceed all other published safety standards, should not be stigmatized by the quasi-criminal imposition of punitive damages. Infliction of punishment in such circumstances deprives the manufacturer of due process because the manufacturer does not have the fair notice required by due process — i.e., notice sufficient to permit it to tailor its conduct to comply with the law and thereby avoid punishment altogether.

ARGUMENT

I. Identifying the Due Process Constraints On An *Award* of Punitive Damages Is An Issue of Great Significance Because of the Quasi-Criminal Nature of Punitive Damages Awards.

It is vitally important for this Court to clarify the threshold for the imposition of punitive damages under the Due Process Clause. The Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. *State Farm*, 538 U.S. at 416; *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001). Punitive damages awards "serve the same purpose as criminal penalties." *State Farm*, 538 U.S. at 417. However, because civil defendants are not accorded the protections afforded criminal defendants, "punitive damages pose an acute danger of arbitrary deprivation of property." *Id.* (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)).

Much of the recent constitutional jurisprudence has focused on the *amount* of such awards. This case provides an opportunity to clarify the due process standards applicable to the *imposition* of punitive damages in the first place. Due process constraints apply both to the imposition of punishment *and* its excessiveness. Indeed, it is no less important that citizens have fair notice of the conduct that will expose them to punishment than it is that they know how harsh the punishment may be. *See Haslip*, 499 U.S. at 24 n. 12 (rejecting vagueness challenge to standards for determining *amount* of punitive damages because "[d]ecisions about the

appropriate consequences of violating a law are significantly different from decisions as to whether a violation has occurred").

The indiscriminate imposition of punitive damages has "a devastating potential for harm." *State Farm*, 538 U.S. at 417 (quoting *Haslip*, 499 U.S. at 42 (O'Connor, J., dissenting)). A verdict or judgment of malice, intentional misconduct, or recklessness carries a stigma qualitatively greater than, and legally distinct from, a judgment for compensatory damages based on strict liability or even negligence. "[T]here is a stigma attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake. This factor militates in favor of strong procedural safeguards." *Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting); *see also Masaki v. General Motors Corp.*, 71 Haw. 1, 16, 780 P.2d 566, 575 (1989) (punitive damages "can stigmatize the defendant in much the same way as a criminal conviction" and therefore "can be onerous when loosely assessed"); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 280-281 (1983).

The consequences to a manufacturer from a million-dollar verdict for punitive damages are qualitatively different from the consequences of a compensatory award for the same amount. In the product-liability context, an award of punitive damages can give rise to "publicity about litigation that may damage the company's reputation or trigger additional lawsuits, reactions of consumers that could reduce product demand, and reactions of safety regulators such as investigations, product

recalls, or stricter regulations." Steven Garber, *Punitive Damages and Deterrence of Efficiency-Promoting Analysis: A Problem Without a Solution?*, 52 STAN. L. REV. 1809, 1814 (2000).

Such consequences would be serious enough even if the standard for punitive liability were clear and unambiguous. However, given the absence of clear and objective standards under which such damages are imposed (*see* Section II, *infra*), and the inability to avoid the risk of arbitrary imposition of such liability even if a manufacturer employs a conscientious and responsible design process (*see* Section III, *infra*), it is crucial that this Court provide guidance to the lower courts in order to "cabin the jury's discretionary authority" and thereby to limit the imposition of "arbitrary punishments" on product manufacturers. *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007).

II. The Court Should Grant Review to Make Clear That the Due Process Clause Requires Objective Criteria for the Imposition of Punitive Damages.

"Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice * * * of the severity of the penalty that a State may impose'" and "threaten 'arbitrary punishments,' *i.e.*, punishments that reflect not an 'application of law' but 'a decision maker's caprice.'" *Philip Morris*, 549 U.S. at 352 (citations omitted). Therefore, "the Constitution imposes certain limits, in respect *both to procedures for awarding punitive damages* and to amounts forbidden as 'grossly excessive.'" *Id.* at 353 (citations omitted, emphasis

supplied).

A defendant's due process rights are violated by the imposition of *punishment* without adequate notice of the prohibited conduct, just as they would be violated by the imposition of an *excessive punitive award*. *Gore*, 517 U.S. at 574 ("[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice * * * of the conduct that will subject him to punishment"); *Giaccio v. State of Pennsylvania*, 382 U.S. 399, 402-403 (1966) ("a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits"); *see also Sorich v. United States*, 555 U.S. ---, No. 08-410, 2009 WL 425807 at *3, 77 USLW 3228 (Feb. 23, 2009) (Scalia, J., dissenting from denial of cert.) ("this Court has long recognized the 'basic principle that a criminal statute must give fair warning of the conduct that makes it a crime.' * * * It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail" (citing *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964)).

These principles also apply to laws imposing civil liability which are punitive in nature. *See, e.g., Village of Hoffman Estates* v. *Flipside Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (strict scrutiny for statute that imposed quasi-criminal penalties); *Champlin Ref. Co.* v. *Corp. Comm'n*, 286 U.S. 210, 241 (1932) (penalty statute unconstitutionally vague where it was designed not to remedy a violation but "to inflict punishment"); *A.B. Small Co.* v. *American Sugar Ref. Co.*, 267 U.S. 233 (1925) (statute unconstitutionally vague in civil case); *S.W. Tel. &*

Tel. Co. v. *Danaher*, 238 U.S. 482 (1915) ($6,300 civil penalty violated due process).

The Due Process Clause requires clear, ascertainable standards for all essential steps leading to the imposition of punitive damages. *See Bankers Life and Cas. Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) ("[the Mississippi Supreme Court's] grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process.") (O'Connor, J., concurring); *see also Philip Morris*, 549 U.S. at 354 ("to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation").

"[T]his Court has often recognized 'the basic principle that a criminal statute must give fair warning of the conduct that makes it a crime.'" *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001), quoting *Bouie*, 378 U.S. at 350; *See also*, *Connally v. General Constr. Co.*, 269 U.S. 385 (1926) (penal statute creating an eight-hour day for state workers and providing for wages "not less that the current rate of per diem in the locality where the work is performed" is vague for uncertainty); *U.S. v. Capitol Traction Co.*, 34 App. D.C. 592 (1910) (penal statute making it an offense for a street railway company to run insufficient cares to accommodate passengers "without overcrowding" is void for uncertainty).

It follows that due process requires fair notice to defendants sufficient to enable them to avoid conduct that will expose them to *any* punishment. It is not enough that a defendant is found to be "reckless" under a "standard" formulated and applied only after the fact by a jury convened solely for a single case. Rather, due process requires that

"recklessness" for purposes of imposing punitive damage liability must be tethered to concrete, knowable standards, not ad hoc and retrospective balancing.

The Due Process Clause forbids criminal convictions for conduct that is not defined with sufficient specificity to permit a defendant to know what conduct is prohibited. For example, in *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921), this Court reviewed a federal anti-profiteering statute enacted as part of the price-control system established during World War I that made it "unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." This Court held that the Fifth and Sixth Amendments require an ascertainable standard of guilt that is adequate to inform those accused of the nature and cause of the accusation against them. *Id.* This Court further held that the statute in question "forbids no specific or definite act," and therefore impermissibly left it to the judge and jury to decide what was prohibited. *Id. L. Cohen Grocery* thus stands for the proposition that it is not enough that a defendant is found to be "reckless" for purposes of imposing punitive damages — it is necessary that the defendant recklessly engaged in a defined, prohibited act.

Due process likewise precludes the imposition of punishment whenever the defendant reasonably could have concluded that its conduct was lawful. *See generally Colautti v. Franklin*, 439 U.S. 379 (1979) (statute that predicated criminal responsibility on a "complex medical judgment about which experts can — and do — disagree" was

unconstitutionally vague); *Connally*, 269 U.S. at 392 (law imposing criminal penalties "should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another") (citation omitted); *S.W. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490 (1915). The same principles apply to punishment meted out in a civil proceeding. The fact that punitive damages are "quasi-criminal" underscores the need for due process protection against their arbitrary and standardless imposition. *Cooper Industries*, 532 U.S. at 432-433 ("Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion"). Although punitive damages awards "serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered." *State Farm*, 538 U.S. at 417.

The due process standard, which protects all citizens from punishment based on vaguely defined offenses, is functionally identical to the qualified immunity standard, which protects public officials from civil liability based on legal obligations that are not "clearly established." *United States* v. *Lanier*, 520 U.S. 259, 270-271 (1997). The qualified immunity test for public officers is "simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals

have traditionally possessed in the face of vague criminal statutes." *Id.* Officials are entitled to qualified immunity as long as their conduct is "objectively reasonable," *i.e.*, as long as reasonable officials could conclude that the conduct at issue was lawful. *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (immunity available if officers act in an "objectively reasonable manner;" defendants "will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that the conduct was lawful"); *accord, e.g.*, *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (under "settled law," officers are entitled to immunity "if a reasonable officer could have believed" that his or her conduct was lawful); *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987) ("The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's [conduct] to be lawful"). Accordingly, "if officers of reasonable competence could disagree on [the matter at] issue, immunity should be recognized." *Malley*, 475 U.S. at 341; *see also Anderson*, 483 U.S. at 641 (due process vagueness test is equivalent to the test for qualified immunity, and public officials are entitled to qualified immunity if "a reasonable officer could have believed the [conduct] to be lawful").

"[T]he point of due process — of the law in general — is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim." *State Farm*, 538 U.S. at 418.

This case exemplifies the need for this Court to clarify the constitutional threshold that state law must meet before imposing punitive damages upon a manufacturer. After all, what could any conscientious automobile manufacturer have done in order to avoid the risk of punitive damages in the situation that existed for Petitioner in this case? It could look to the applicable Federal Motor Vehicle Safety Standard in effect at the time of manufacture, but Petitioner's design already exceeded that standard. It could look to industry standards and practices, but its design already conformed to such practices. It could make the seats even less likely to yield than those of other manufacturers, but increasing the seat's stiffness and strength would increase the frequency and severity of injuries in other types of collisions, thereby trading the potential injuries of one class of accident victims for those of others. In short, no objective criterion to which the Petitioner could have turned would avoid exposure to punitive liability under the Tennessee punitive damages regime.

Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition. *Gore*, 517 U.S. at 568. But just as one state "may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States," punitive liability should not be imposed on a defendant whose conduct was lawfully in compliance with a detailed, applicable federal regulation. *Id.* at 572-573 ("Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may

Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions") (citations and footnote omitted).[3]

The lower court also ignored the third guidepost identified in *Gore* for judging the excessiveness of a punitive damages award. The third guidepost is the legislative sanction for the conduct for which punitive damages are awarded. *Gore* requires that the reviewing court give "substantial deference" to this sanction. 517 U.S. at 583. Because Petitioner's seat design complied with and substantially exceeded the federal regulatory standard for seat back strength, the largest permissible penalty that could have been imposed for such conduct was "zero." The lower court should have considered the lack of legislative or administrative sanctions as an important reason to reject punitive damages altogether. Instead, the lower court noted that courts have experienced frustration in applying the three guideposts when the results the guideposts suggest are not aligned and, in effect, ignored this guidepost altogether. App. 35a.

Moreover, even had Petitioner's conduct ultimately been found unlawful, punishment should not have been imposed if its conduct was not

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[3] *See, e.g.*, W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 36 n. 41 at 233 (5th ed. 1984) ("[I]n most contexts. . .compliance with a statutory standard should bar liability for punitive damages"); *Stone Man, Inc. v. Green*, 263 Ga. 470, 471-472, 435 S.E. 2d 205, 206 (1993) ("such [statutory] compliance does tend to show that there is no clear and convincing evidence of willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences." (citation omitted)).

objectively unreasonable. *Safeco Ins. Co. of America v. Burr*, 127 S. Ct. 2201, 2215 (2007). *Safeco* involved the Fair Credit Reporting Act (15 U.S.C. § 1681a *et seq.* (FCRA)), which provides, among other things, that "willful" failures to comply with the statute may result in an award of punitive damages. The term "willful" encompasses not only "knowing" violations but also "reckless disregard of statutory duty." *Safeco*, 127 S. Ct. at 2208. The long-established, common law meaning of the term "recklessness" necessarily requires reference to *objective* standards: "[w]hile 'the term recklessness is not self-defining,' the common law has generally understood it in the sphere of civil liability as *conduct violating an objective standard*: action entailing 'an unjustifiably high risk of harm that is either known or *so obvious that it should be known*.'" *Id.* at 2215 (emphasis added; citation and footnote omitted.)

While the defendant in *Safeco* acted intentionally in violating the FCRA, the defendant had a "foundation in the statutory text" for its belief that its conduct was lawful which, although erroneous "was not objectively unreasonable" so that the defendant did not act "willfully" or with "reckless disregard." *Id.* at 2215-22. "Where * * * the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator." *Id.* at 2216 n. 20. By analogy to the cases establishing qualified immunity, the Court considered whether the defendant's action was reasonable in light of legal rules that were "clearly

established" at the time. *Id.* at 2216. In the absence of authoritative guidance from the governing agency (the FTC) and no decision from the court of appeals, the Court held that Safeco's decision was not objectively unreasonable.

This Court has invalidated civil sanctions, as a matter of procedural due process, when state legislations "imposed a significant penalty on a common carrier which lacked the means of determining the legality of its actions before the penalty was imposed." *Gore*, 517 U.S. at 601 (citing *Danaher*, 238 U.S. at 489-491). Similarly the reasoning in *Safeco* is constitutionally based.

Safeco's violation of FCRA could not support the imposition of punitive damages because its actions were based on a reasonable but erroneous interpretation of the statute. In the present case, Petitioner's design did not violate the applicable regulation at all; its actions were held punishable even though Petitioner exceeded the applicable Federal Motor Vehicle Safety Standard, promulgated pursuant to 49 U.S.C. §§ 30301 *et seq.*;[4] even though it complied with industry custom and relied on expert opinion; and even though it would increase the risk of injury in other kinds of collisions if it made the seats less likely to yield.

In short, there was no evidence that Petitioner violated any objective standard concerning how seats should be designed. The extent by which a manufacturer ought to exceed the regulatory standard to achieve optimum safety appears to have been a subject on which design engineers acting

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[4] Federal Motor Vehicle Safety Standard (FMVSS) 207, 49 C.F.R. § 571.207. *See* App. 18a.

in good faith would — and did — disagree. Consequently, Petitioner had no advance notice of the conduct that would expose it to punishment. Absent violation of a clearly established and objective standard, the Due Process Clause decisions forbid hindsight punishment. Moreover, the imposition of punitive damages on a manufacturer under these circumstances has no salutary, deterrent effect because the manufacturer is unable to determine what it must do to avoid the punishment prospectively.

However a manufacturer's choice may be judged for purposes of *compensatory* damages, it should not give rise to *punitive* damages when neither expert engineers, nor designers, nor federal regulators at the time had reached a general consensus on a different course than that which the manufacturer took. In this situation, Petitioner could reasonably believe that its conduct was lawful, and Petitioner's "wrong" was not "clearly established" before punishment. *See Lanier*, 520 U.S. at 270-271.

III. Product Liability Lawsuits Pose a Significant and Persistent Risk of Arbitrary and Standardless Imposition of Punitive Damages.

Product liability cases pose particularly significant and persistent risks of the arbitrary imposition of punitive damages. There are a variety of reasons for this. First, such cases frequently involve catastrophic injury or death. Second, many products, no matter how well designed, carry unavoidable risks. Third, the design process necessarily involves attempts to identify risks and

balance them against other risks and against the utility of the product. These unique aspects of product liability cases make manufacturers particularly susceptible to punitive liability by juries that are exhorted to conflate intent to design a product in a particular way with intent to injure.

The risk of physical injury is inherent in the manufacture, sale and use of many products. Because of their size and mobility, motor vehicles are, by their very nature, capable of colliding violently with other vehicles, objects, and pedestrians. A life-saving vaccine may protect millions of people yet pose a risk of known, serious side effects to a few. Butter may make popcorn and toast delicious but increase the levels of cholesterol and even the risk of death. For many kinds of products, some injuries are certain to occur, no matter how well the product is designed and manufactured.

In essence, products are frequently designed — carefully but intentionally — with known risks to consumers. Design defect cases inevitably raise "conscious design choice[s]' * * * implicat[ing] a manufacturer's decisionmaking process concerning risk-utility"; "[u]nlike the standard negligence case of yesteryear, the modern products liability case comes with 'intent' built in." Aaron D. Twerski, *Punitive Damages: Through the Five Prisms*, 39 VILL. L. REV. 353, 356 (1994). The task of a conscientious manufacturer is to strike a reasonable balance between safety and a host of other considerations, including "marketability, appearance, ease of operation, durability, freedom from maintenance or repair, ease of manufacture, and economics of materials and labor." Richard C. Ausness,

Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation, 74 KY. L.J. 1, 88-89 (1985). *See also* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 22-26 (1982).

A manufacturer's weighing of uncertain risks against uncertain benefits requires it to decide prospectively. A jury, by contrast, decides after the fact, with full knowledge of the outcome, and with the victim, or the victim's family, in the courtroom. The manufacturer (and the government regulator) must consider the *overall* safety and utility of the product for *all* users, whereas the plaintiff asks the jury to focus on the *specific* feature or condition that gives rise to a *specific* plaintiff's injury.[5]

Tort law requires manufacturers to make difficult choices in balancing these factors in making design and warnings decisions.[6] When this "built in" intentionality is imported into a punitive damages analysis, however, it creates the risk that any attempt by the manufacturer to "think about risks in

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[5] Comments from the Third Restatement may be instructive on this point. *See, e.g.*, Restatement (Third) of Torts, Products Liability § 2 cmt. *f* ("When evaluating the reasonableness of a design alternative, the overall safety of the product must be considered. It is not sufficient that the alternative design would have reduced or prevented the harm suffered by the plaintiff if it would also have introduced into the product dangers of equal or greater magnitude").

[6] *See* W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 286, 299-310 (1998), for a discussion of the complexities affecting corporate decisionmaking as to uncertain safety risks, together with specific examples of situations in which such decisions may be made.

a systematic manner and to undertake [cost-benefit] calculations to ensure that there is appropriate risk balancing that is sufficiently protective" of all interests will be seen, not as a socially responsible aspect of product design, but as egregious misconduct justifying severe punishment. W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 550 (2000).

Far from encouraging an open and thorough consideration of product safety, the resulting punitive awards will deter such socially responsible behavior or, at least, deter manufacturers from conducting full-fledged and transparent cost-benefit analyses. *See, e.g.*, Garber, *Punitive Damages and Deterrence of Efficiency-Promoting Analysis*, 52 STAN. L. REV. at 1814 ("[T]he perceived likelihood and potential costs associated with punitive damages for performing risk or benefit-cost analyses can be large enough to attract attention by corporate decision makers and deter them from doing such analyses."). In the present case, for example, the evidence that Petitioner believed that the applicable Federal Motor Vehicle Safety Standard was inadequate — and its consequent decision to design a seat that "drastically exceeded" that standard — is indicative of a responsible design process, not one that deserves punishment.

Moreover, product liability cases inescapably present the facts through the lens of hindsight, with a tragically injured plaintiff on the one hand, and a manufacturer, likely a large corporation, on the other. The jury can easily be provoked to a state of outrage that leads it to award punitive damages regardless of the actual culpability of the manufacturer's conduct or the actual need for

punishment and deterrence. As Judge Easterbrook has explained:

> The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. Engineers design [complex products] to minimize the sum of construction, operation, and injury costs. * * *
>
> Come the lawsuit, however, the [plaintiff] injured by [the product] presents himself as a person, not a probability. Jurors see today's injury; persons who would be injured [by an alternative design] are invisible. Although witnesses may talk about them, they are spectral figures, insubstantial compared to the injured plaintiff, who appears in the flesh. * * * [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation. And the claims of crippled neighbors receive more weight than do potential injuries to be felt by [consumers] (and stockholders) in other states.

Carroll v. Otis Elevator Co., 896 F.2d 210, 216 (7th Cir. 1990) (Easterbrook, J., concurring) (citation omitted); *see also* W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107, 116 (2001) (in the jury's mind, a manufacturer's "superior *ex ante* risk judgments may be outweighed by the *ex post* reality of the accident victim"); Owen, *Problems in Assessing Punitive*

Damages Against Manufacturers of Defective Products, 49 U. CHI. L. REV. at 25 (adequate standards for punitive liability necessary to "ensure that the necessarily deliberate nature of a manufacturer's decision making will not be twisted artfully and unfairly into an appearance of conscious wrongdoing").

The lower courts therefore need guidance to ensure that state law requires "proper standards that will cabin the jury's discretionary authority" and to afford the defendant fair notice of the conduct that may subject it to punishment. *Philip Morris, supra*, 549 U.S. at 352. As it presently stands, the common-law punitive damages formulation, as illustrated by the Tennessee Supreme Court's decision in this case, cannot provide fair notice of the conduct which will subject a manufacturer to punishment.

CONCLUSION

For the reasons set forth above, *amicus curiae* PLAC respectfully requests that the Court grant a writ of certiorari to identify and apply the appropriate constraints that due process requires.

Respectfully submitted,

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March 16, 2009

APPENDIX
Corporate Members of the Product Liability Advisory Council
as of 3/6/2009

Total: 108

3M
A.O. Smith Corporation
ACCO Brands Corporation
Altec Industries
Altria Client Services Inc.
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Beretta U.S.A. Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Brown-Forman Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Crown Equipment Corporation

Daimler Trucks North America LLC
E.I. DuPont De Nemours and Company
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Genentech, Inc.
General Electric Company
GlaxoSmithKline
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
Intemational Truck and Engine Corporation
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Joy Global Inc.
Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.

Microsoft Corporation
Mitsubishi Motors North America, Inc.
Mueller Water Products
Newell Rubbermaid Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Nokia Inc.
Novartis Pharmaceuticals Corporation
PACCAR Inc.
Panasonic
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
The Dow Chemical Company
The Goodyear Tire & Rubber Company
The Heil Company
The Sherwin-Williams Company
The Toro Company
The Viking Corporation
TK Holdings Inc.
Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.
TRW Automotive
Vermeer Manufacturing Company
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.